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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. **77-1101**

PAPPAS TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	19

CITATIONS

Cases:

<i>Carroll Broadcasting Company v. Federal Communications Commission</i> , 258 F.2d 440 (D.C. Cir., 1958)	18
<i>Colby-Bates-Bowdoin Educational Telecasting Corporation v. Federal Communications Commission</i> , 534 F.2d 11 (1st Cir., 1976)	3, 13, 14
<i>Federal Communications Commission v. Sanders Bros.</i> 309 U.S. 470 (1940)	16
<i>Home Box Office v. Federal Communications Commission</i> , Case No. 75-1280, D.C. Cir., March 25, 1977	7
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	12, 16
<i>National Cable Television Association v. United States</i> , 415 U.S. 336 (1974)	12
<i>Pikes Peak Broadcasting Co. v. Federal Communications Commission</i> , 422 F.2d 671 (D.C. Cir., 1969), cert. denied, 395 U.S. 979 (1969).	13, 14
<i>United States v. Midwest Video Corp.</i> , 406 U.S. 649 (1972)	11, 12
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 163 (1968)	4, 10, 18

(ii)

<i>FCC Authorities:</i>	<u>Page</u>
<i>Cable Television Report and Order</i> 36 F.C.C.2d 143 (1972)	7, 9
<i>Commission Policy on Programming, FCC 60-970,</i> 20 Pike & Fisher R.R. 1901 (1960)	16
<i>First Report and Order (Docket No. 14985),</i> 38 F.C.C.2d 201 (1969)	17
<i>Greater New England Television Co.,</i> 45 F.C.C.2d 597 (1974)	8
<i>High Fidelity Cable Television,</i> 47 F.C.C.2d 73 (1974)	5
<i>KID Broadcasting Corp., 61 F.C.C.2d</i> 1155 (1976)	15, 17
<i>Primer on Ascertainment of Community Problems,</i> 27 F.C.C.2d 650 (1971)	16
<i>West Hawaii Cable Vision, Ltd.,</i> 45 F.C.C.2d 716 (1974)	5
 <i>Statutes and Rules:</i>	
<i>Communications Act of 1934, as amended,</i> 48 Stat. 1064, 47 U.S.C. § 151 <i>et seq</i>	
Section 303(g)	10, 18, 19
Section 307(b)	10, 18, 19
 <i>Rules and Regulations of the Federal</i> <i>Communications, 47 C.F.R. § 0.1</i> <i>et seq. (1974)</i>	
Section 73.683(a)	4
Section 76.7	5, 9
Section 76.51(a)	5
Section 76.63	6
Section 76.151	8

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Pappas Television, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 25, 1977.

OPINION BELOW

The judgment of the Court of Appeals entered on October 25, 1977, (App., p. 85)¹ has not been

¹The appendix to this petition is set forth under separate cover.

published. The decisions of the Federal Communications Commission under review in this petition are *Fresno Cable TV Co., Inc.*, 48 F.C.C.2d 116 (1974) (App., p. 8), *reconsideration denied*, 50 F.C.C.2d 340 (1974) (App., p. 22) (Case No. 75-1116, D.C. Cir.); *Fresno Cable Television Company, Inc.*, 57 F.C.C.2d 134 (1975) (App., p. 34), *stay denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *San Joaquin Cable TV*, 59 F.C.C.2d 525 (1976) (App., p. 59), *Stay Denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *Pappas Television, Inc.*, 61 F.C.C.2d 1051 (1976) (App., p. 70) (Case No. 76-2042, D.C. Cir.).

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1977, (App., p. 85) and this petition for certiorari is being filed within the time allowed by the Court. By order dated January 24, 1978, Mr. Chief Justice Warren Burger extended to February 6, 1978, the time within which to file a petition for writ of certiorari (No. A-600). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 152(a), 303(f), 303(g), 303(r) and 307(b), Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. §151 *et seq.* (App., p. 1-2).

QUESTIONS PRESENTED

The judgment of the Court of Appeals presents the following questions:

I. Whether the Commission's decisions affirmed by the court below have exceeded the outer limits of FCC

ancillary jurisdiction over CATV in the exercise of its responsibilities for the regulation of television broadcasting.

II. Whether the Commission's decisions, as affirmed by the court below, provided due process in an agency proceeding, and whether they are in conflict with the decision of the first circuit in the case of *Colby-Bates-Bowdoin Educational Telecasting Corporation v. F.C.C.*, 554 F.2d 11 (1976).

III. Whether a station's inability to broadcast news and public affairs programs because of the impact of Cable Television can be determined by the Federal Communications Commission to be outweighed, in public interest terms, by the importation of distant signals by cable systems in the market.

STATEMENT OF THE CASE

This petition seeks review of an October 25, 1977 *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit (App., p. 85) affirming a series of decisions by the Federal Communications Commission (herein "Commission") (App., pp. 8, 22, 34, 53, 59 and 70)² denying Pappas

²Specifically, the actions of the Federal Communications Commission under review in this petition are *Fresno Cable TV Co., Inc.* 48 F.C.C.2d 116 (1974) (App., p. 8), *reconsideration denied*, 50 F.C.C.2d 340 (1974) (App., p. 22) (Case No. 75-1116, D.C. Cir.); *Fresno Cable Television Company, Inc.*, 57 F.C.C.2d 134 (1975) (App., p. 34), *stay denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *San Joaquin Cable TV*, 59 F.C.C.2d (1976) (App., p. 59), *Stay Denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *Pappas Television, Inc.*, 61 F.C.C.2d 1051 (1976) (App., p. 70) (Case No. 76-2042, D.C. Cir.). Companion cases, Nos. 75-1115 and 75-1408, D.C. Cir., are not under review.

Television, Inc., licensee of Independent UHF Television Station KMPH-TV, identified as Tulare-Fresno, California, any relief against the importation of distant independent television signals³ by Cable Television systems located in major communities throughout the Fresno television market and served by KMPH-TV. The reviewing court's judgment adopts the decision of the Commission (App., p. 85). Accordingly, what is before this court for review are the actions of the Commission. (App., pp. 8, 22, 34, 53, 59 and 70.)

While Station KMPH is an independent UHF television station licensed to Tulare, California, a community of approximately 16,200 people, it is, along with two other independent stations, three network affiliates, and an educational station, part of the Fresno California television market. Station KMPH commenced operations on October 11, 1971 using a three-million watt transmitter located on a high mountain and places better than a city grade signal well beyond the entire City of Fresno and a Grade B or better signal over all of the Fresno television market (Fresno Area of Dominant Influence or ADI).⁴ KMPH's signal covers essentially the same area as the three network affiliates licensed to Fresno.

³The term "distant signal" has been given a specialized definition by the Commission as a signal which is extended or received beyond the Grade B contour of that station. See 47 C.F.R. §73.683(a). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163, n. 16 (1968). Here, there is no question that the proposed signals from Oakland and Sacramento are not receivable off the air in the Fresno television market.

⁴The term Area of Dominant Influence or ADI is a term formulated by Arbitron (formerly ARB) to define a television market and is universally accepted in the broadcast field. The Fresno ADI encompasses all of the specific communities involved here.

These proceedings were initiated by KMPH pursuant to 47 C.F.R. §76.7 to obtain relief from the importation of distant independent television signals of UHF stations located in the San Francisco/Oakland market, the seventh largest television market in the country, 47 C.F.R. §76.51(a).⁵ Although hampered by the lack of any discernable standards as to what a special relief petition should contain, KMPH submitted extensive data demonstrating its precarious financial position, citing the uniqueness of the market and long history of economic failures, even without CATV competition, by no less than *five* UHF independents.⁶ It further pointed out that cable television activity had been initiated in every major community within KMPH's service area in the Fresno Television Market. In addition, in recognition of the cumulative impact that each of these systems would have on KMPH's ability to operate in the public interest, KMPH requested that the Commission consolidate these separate matters into one proceeding in order to avoid the potential of piecemeal decisions.⁷ Without some degree of relief from CATV distant signal imports, KMPH argued that it would be severely hampered in its ability to provide local news and public affairs programming and might even be faced with the threat of being forced to cease operations completely.⁸

⁵The Fresno television market, which includes KMPH, is the 72nd television market.

⁶See, App., p. 13, n. 6.

⁷The relief of consolidation was not unique and had been utilized by the Commission in the past under similar circumstances. See, *High Fidelity Cable Television*, 47 F.C.C.2d 73 (1974); *West Hawaii Cable Vision Ltd.*, 46 F.C.C.2d 716 (1974).

⁸Even though the Commission has recognized that local independent UHF stations are the most vulnerable to CATV, the
[footnote continued]

The Commission rejected these arguments as "speculative" (see, e.g., App., pp. 15, 29-30) and inferred that KMPH had not demonstrated that the relief sought would not be harmful to the cable systems involved (App., p. 16), a burden not heretofore imposed on a petitioner. While rejecting the KMPH showing, the Commission, in the same decision, granted relief to station KAIL based on what it called a "compelling demonstration" of need. (App., p. 10.)⁹

After its initial rejections,¹⁰ KMPH, in spite of the fact that it was new and heavily debt ridden, commissioned a complete in-depth economic study (the Cooper Study) of the effect on KMPH of independent signal importation in the KMPH service area namely, the Fresno television market. A critical problem faced by Pappas in the preparation of the study the Commission demanded was the absence of any standards by which the requisite "substantial showing" necessary to overcome the "go, no-go" concept of the rules could be measured. As a consequence, Pappas filed a freedom of information request with the Commission and asked for the information and impact analysis (if any) which formed the basis for the CATV

rules, paradoxically, prohibit importation of network stations but allow importation of independents. 47 C.F.R. § 76.63.

⁹KAIL's entire demonstration was as follows:

"3. The KAIL renewal application (filed in 1971) reflects the difficult situation in the Fresno market. KAIL's accumulated deficit to July 1, 1970 was \$337,659. The 1970-71 fiscal year brought further losses of \$102,102, increasing the accumulated deficit to \$439,761 (BRCT-557, amendment of 11/26/71). Losses have continued since then." (App., p. 4.)

¹⁰App., pp. 8 and 22. Also, Case Nos. 75-1115 and 75-1408, D.C. Cir., which are not under review.

rules adopted in the *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972) dealing with the importation of distant television signals. The documents received were utterly useless as guides and, in fact, demonstrated the absence of any standards, either for the adoption of the rules or the evaluation of petitions for relief.¹¹

Nevertheless, the Cooper Study was prepared and was initially submitted as a supplement to the Pappas objection to the applications of Fresno Cable Television Co. for Certificates of Compliance for the City of Fresno and unincorporated portions of Fresno County, which represents the heart of KMPH's service area. The Commission refused to consider the study in connection with the Fresno Cable application on the grounds of timeliness, even though Fresno Cable had permitted its certificate requests to remain fatally deficient for the very same period. Instead, the Commission, on its own initiative, established a separate "special relief" proceeding to consider the Cooper Study (App., p. 40, n. 7).¹² When the study was timely filed in connection with the certificate of compliance request of San Joaquin Cable TV for Fresno, the Commission again refused to consider that study except in the "special relief" proceeding. (App., p. 61.)

¹¹The Commission has never disputed this. In fact, it appears that its rules were adopted as a result of an *ex parte* "Consensus Agreement" between the industry leaders, as opposed to open rule making, *Cable Television Report and Order* 36 F.C.C.2d 143, 165 (1972), an approach which has met with judicial skepticism. *Home Box Office v. F.C.C.*, Case No. 75-1280, D.C. Cir. March 25, 1977.

¹²While KMPH did not oppose the establishment of an overall review of cable activity in the Fresno ADI and its effect on KMPH, it is erroneous to say that the special relief proceeding was established with KMPH's consent. (App., p. 89.)

In the special relief proceeding that followed, KMPH responded to the criticisms filed by various participating cable systems with a detailed reply, including the opinions of a second well known and respected media economist (Clay).¹³ KMPH reemphasized the total lack of Commission standards for Petitioners to follow in seeking to obtain special relief. Nevertheless, KMPH demonstrated that a substantial loss of revenue would result if the proposed importation of two distant independent stations were permitted¹⁴ and that such losses would cripple any attempts by KMPH to even begin to provide meaningful local news and public affairs programming, much less continue it. The Commission did not disagree with KMPH that a loss of revenues was inevitable nor the showing as to the effect on the station's ability to serve the public interest. It simply concluded that it (the Commission) would not become concerned with the reinvestment policies of the station. (App., p. 83, n 8).

On review, the Court below affirmed the Commission's action noting that in order for a television station to obtain special relief from the importation of distant signals by CATV, the petitioner must prove not only that the local television station would be injured, but also that the grant of such relief would not prevent cable from successfully entering the market. (App., p. 88.)

¹³The Commission in its decision (App., p. 70) completely ignored the comments of the second economist (Clay) who independently reached the same conclusions as Cooper. Mr. Clay's expert testimony has been accepted in numerous Commission proceedings.

¹⁴KMPH also sought alternative relief such as syndicated program protection under Rule 76.151, 47 C.F.R. § 76.151, which the Commission, on its own motion, has granted in other cases. *Greater New England Television Co.*, 45 F.C.C.2d 597 (1974).

REASONS FOR GRANTING THE WRIT

I.

THE COMMISSION'S DECISIONS, AFFIRMED BY THE COURT BELOW, PRESENT AN IMPORTANT QUESTION OF THE OUTER LIMITS OF FCC ANCILLARY JURISDICTION OVER CATV IN THE EXERCISE OF ITS RESPONSIBILITIES FOR THE REGULATION OF TELEVISION BROADCASTING.

In its decision, the court below stated that in order to be successful, a petitioner seeking relief under Section 76.7 of the FCC's rules¹⁵ from the importation of distant television signals by CATV systems must show:

"...that the challenged aspects of the cable programming will substantially damage local stations *and* that such aspects could be deleted without preventing cable from successfully entering the market" (underscoring that of the court below). (App., p. 88.)

Thus, the FCC's jurisdiction over CATV has been expanded to encompass not just ancillary control of CATV in the exercise of its responsibilities over television, but a responsibility to insure that cable is able to "successfully" enter the market, even where, as here, that entry substantially damages the local television station's ability to operate in the public interest.

This expanded jurisdiction is the product of a rule making proceeding whereby the Commission, reversing prior determinations, declared that it had the jurisdiction and the basic responsibility "to get cable moving."¹⁶ In short, the Commission extended its

¹⁵47 C.F.R. § 76.7.

¹⁶*Cable Television Report and Order*, 36 F.C.C.2d 143, 164 (1972).

non-statutory jurisdiction over CATV to generally encourage the larger and more effective use of cable, even though such action would be detrimental to the Commission's statutory jurisdiction and responsibility "to generally encourage the larger and more effective use of radio in the public interest" and its statutory responsibility for the establishment of a "fair, efficient and equitable distribution" of television service. (47 U.S.C. 303(g), 307(b).)¹⁷

This court, in the case of *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), sustained FCC jurisdiction over CATV to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178. In so doing, this court recognized the fact, as found by the Commission, that "the importation of distant signals into the service areas of local stations necessarily creates 'substantial competition' for local broadcasting" the result of which was the likelihood of a substantial negative effect upon station audience and revenues. *Id.* at 165. (Emphasis added.)

The Commission's ancillary jurisdiction over CATV was upheld in order that the Commission could carry out its obligation of providing a widely dispersed radio and television service with a fair, efficient and equitable distribution of service among the several states and communities. *Id.* at 173, 174. That obligation requires

¹⁷Section 307(b) reads as follows:

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

for its satisfaction the creation of a system of local broadcasting stations, such that all communities of appreciable size will have at least one television station as an outlet for local self expression, *Id.* at 174, the significance of which can scarcely be exaggerated, *Id.* at 177. Thus, ancillary jurisdiction over CATV was confirmed by this court primarily because importation of distant signals into the service areas of local stations can destroy or seriously degrade the service offered by a television broadcaster and thus ultimately deprives the public of the various benefits of local broadcasting stations. *Id.* at 175.

In the only other case directly concerned with the Commission's jurisdiction over CATV,¹⁸ *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), this court upheld the Commission's 1969 *First Report and Order*, 20 F.C.C.2d 201, requiring CATV systems to originate local programming.¹⁹ There, it was the Commission's position that since "the use of broadcast signals has enabled CATV to finance the construction of higher capacity cable facilities," local origination by certain large systems (over 3500 subscribers) would facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service in areas where the Commission has been unable to accomplish this through broadcast media. *Id.* at 656.²⁰

¹⁸This court specifically noted in *Midwest Video Corp.* that the importation of distant signals into major markets was not an issue before it for consideration. *Id.* at 652, n. 4.

¹⁹That requirement has since been deleted by the Commission. *Report and Order* (Docket 19988), 49 F.C.C.2d 1090 (1974).

²⁰That concept does not apply here since the Fresno television market, which is served by seven television stations, has clearly achieved a fair, efficient and equitable distribution of television service.

Midwest Video also reaffirmed the tenets of *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) which held that a broadcast station should not only be ready and willing, *but be able as well* to supply the local program needs by coverage of local events. To be "able" a station must necessarily have the financial wherewithall to carry out its public interest responsibilities.

In his concurring opinion in *Midwest Video, supra*, at 676, the Chief Justice was no less concerned than the four dissenting justices over the question of just how far the Commission's jurisdiction over cable went. He observed there that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction [over CATV] that has evolved by decisions of the Commission and the courts."

Here, those outer limits have been exceeded. The Commission has now affirmatively taken the position that it has the jurisdiction and the responsibility to *insure* CATV's *successful* entry into the marketplace,²¹ not as a function ancillary to its regulation of television broadcasting, but as a function separate and apart from that regulation. Ancillary jurisdiction has, by Commission fiat, become primary jurisdiction. There is nothing in the Communications Act or the decisions of this court to support that position.

²¹That position is contrary to this court's observation that the backbone of CATV is individual enterprise and ingenuity, not governmental largesse. *National Cable Television Association Inc. v. United States*, 415 U.S. 336 (1974).

II.

THE COMMISSION'S DECISIONS, AS AFFIRMED BY THE COURT BELOW, RAISE SERIOUS QUESTIONS WITH RESPECT TO DUE PROCESS IN AGENCY PROCEEDINGS AND ARE IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT IN THE CASE OF *COLBY-BATES-BOWDOIN EDUCATIONAL TELECASTING CORPORATION V. F.C.C.*, 554 F.2d 11 (1976).

A question that has long plagued petitioners coming before the Federal Communications Commission for relief under its CATV Rules has been the absence of any announced standards used by the Commission in adopting its CATV rules or the particular standards that petitioners must meet and overcome in order to obtain relief. Although this has been a matter of concern for many years,²² the Commission has steadfastly refused to enunciate its standards. The only thing that petitioners are told is that the Rules are "go, no-go" and that to overcome that concept the petitioners have a "substantial burden." By its deliberate impreciseness, the Commission remains free to be as arbitrary as it pleases. This necessarily deprives the parties appearing before the Commission of due process. Here, Pappas submitted to the Commission an exhaustive study (the Cooper Study) demonstrating that should the CATV systems operate as proposed, the Pappas television station, KMPH-TV, would suffer an approximate eight percent loss in revenue and that losses of such magnitude would prevent KMPH-TV from presenting news and public affairs programming. The Commission, relying on an *ex parte* staff analysis,²³ determined that

²²See the opinion of Judge Bazelon in *Pikes Peak Broadcasting Co. v. Federal Communications Commission*, 422 F.2d 671, 683 (1969), *Cert. denied*, 395 U.S. 979 (1969).

²³Pappas, fearing the Commission's arbitrariness, had requested a review of any such staff analysis and asked for oral argument

[footnote continued]

the amount of losses would range between 6 and 6.9 percent. With respect to the fact that such a loss would adversely affect the station's ability to broadcast news and public affairs programming, the Commission simply stated that it was not concerned "with the reinvestment policies of the station" (App., p. 83).

In contrast, a three sentence paragraph submitted by Station KAIL in this very same proceeding reflecting its losses was found to be sufficient to qualify it for special relief. The result was that the programming of an all Spanish UHF television station in Hanford, which is part of the Fresno television market and which places a city grade signal over the communities involved, was kept off the cable in order to protect thirty minutes of Spanish language programming per week broadcast by Station KAIL.

The United States Court of Appeals for the First Circuit in *Colby-Bates-Bowdoin Educational Telecasting Corporation v. F.C.C.*, 534 F.2d 11 (1976) reflected the same concerns as discussed by Judge Bazelon in *Pikes Peak Broadcasting Company, supra*. There, however, the First Circuit remanded the case to the Commission because the absence of standards resulted in inexplicable disparate treatment of petitioners. The court further noted its concern with the Commission's use of *ex parte* material without affording the petitioner an opportunity to respond. In contrast to the First Circuit, the D.C. Circuit in this case had no problem with the use of such *ex parte* staff material and accepted the Commission's argument that Pappas had not met the Commission's "standards" without ever identifying what those standards were.

before the Commission in order to insure a full and fair proceeding. The Commission summarily denied that request. *Pappas Television, Inc.* 61 F.C.C.2d 1051, 1056 (1976), App., p. 80.

Such a lack of due process as is the case here necessarily leads to disparate results. The Commission's decision affording relief to KAIL in this very proceeding is but one example. Another is the relief granted from CATV competition to a profitable VHF network affiliate which, with little record support, estimated that it would lose approximately 3.68% of its revenues and might have to cut back its news and public affairs programs. *KID Broadcasting Corp.*, 61 F.C.C.2d 1155 (1976). Still another is *Greater New England Cablevision Co.*, 45 F.C.C.2d 597 (1974), where the Commission granted a network affiliated station in a second 50 market (which already enjoyed network non-duplication protection) syndicated program protection of a kind of applicable to the first 50 markets and did so on its own motion even though it found that the station had not submitted evidence to establish any likelihood of financial injury. Here, the commission was silent on such alternative relief even though requested to consider such by Pappas.

The decision below perpetuates a procedural vacuum that breeds arbitrary decisions to an extent never tolerated by this court and otherwise deprives petitioners of due process.

III.

THE DECISION THAT STATION KMPH'S INABILITY TO BROADCAST NEWS AND PUBLIC AFFAIRS PROGRAMS BECAUSE OF THE IMPACT OF CABLE TELEVISION WAS OUTWEIGHED, IN PUBLIC INTEREST TERMS, BY THE IMPORTATION OF DISTANT SIGNALS BY CABLE SYSTEMS IN THE MARKET, IS A QUESTION CONTRARY TO OTHER DECISIONS OF THIS COURT.

Prior to the decisions below, it had been universally held that a broadcaster's efforts to serve the local needs and interests of his community were a cardinal concern of the Commission in the exercise of its duties under the Communications Act. Thus, it has been a basic tenet that the major element of the public interest concept is the broadcaster's service to the community and it is generally recognized that programming is the essence of this radio service. *See, Commission Policy on Programming*, F.C.C. 60-970, 20 Pike & Fisher R & R 1901, 1909-1910 (1960).²⁴ A broadcaster is required to program his station in the public interest,²⁵ and, as this Court has stated, the ability of a broadcaster to render the best practicable service to the community reached by his broadcasts is a vital consideration to be undertaken by the Commission. *See Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, 475 (1940). If a licensee does not make the fullest and most effective use of the channel to which it is entrusted, it is not serving the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 203, 218 (1943).

²⁴That programming necessarily be attuned to the local needs and interest of the local broadcaster's community of license. *See generally Primer on Ascertainment of Community Problems*, 27 F.C.C.2d 650 (1971).

²⁵*Id.* at 1909.

KMPH amply demonstrated to the Commission that its ability to provide the best practicable service to its community in the form of meaningful and regularly scheduled news and public affairs programming would be severely and irreparably damaged if importation of the distant independent signals requested was permitted. This showing went into great detail outlining with specificity the operating and technical costs associated with this new service and demonstrated the detrimental effect importation would have on KMPH's revenues and ability to meet those costs. Although the Commission reluctantly acknowledged that KMPH would indeed be faced with a substantial loss of revenues,²⁶ the loss of service to KMPH's service area and city of license was considered less important than getting CATV moving.

Here, the Commission cavalierly concluded that "it is simply going too far for the Commission to concern itself with the reinvestment policies of the station" (App., p. 83, n 8). The refusal by the Commission to acknowledge the correlation of the KMPH cost data to service to the community is a rather shocking abandonment of the Commission's responsibility under the Communications Act for the orderly development of an appropriate system of local television broad-

²⁶The Commission's own figures (which KMPH disputes) show that KMPH will suffer a 6.1 percent loss of revenues. In *KID Broadcasting Corp.*, 61 F.C.C.2d 1155 (1976), the Commission granted relief to a profitable VHF network affiliated station where a 3.6 percent reduction in revenues was alleged. The Commission, of course, has long recognized that importation of distant signals into the service areas of local stations necessarily creates substantial competition for local broadcasters. *First Report and Order* (Docket No. 14895), 38 F.C.C. 683, 707 (1965).

casting²⁷ and a failure in its duty to concern itself with potential diminution and destruction of service. *Cf.*, *Carroll Broadcasting Company v. Federal Communications Commission*, 285 F.2d 440, 443 (1958).

What the Commission has done is subvert its primary responsibility to the public interest in order to favor benefits to cable, a determination contrary to the Congressional mandate set forth in the Communications Act²⁸ and decisions of this Court.

²⁷*See, United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

²⁸Sections 303(g) and 307(b).

CONCLUSION

The decision below endorses an expansion of agency jurisdiction by fiat that is contrary to the Communications Act. Further, it perpetuates a climate of unparalleled arbitrariness in agency proceedings and allows an abandonment of the statutory responsibilities of the Commission by raising the private interests of CATV over the public interest as set forth in Sections 303(g) and 307(b) of the Communications Act. In light of these factors, it is respectfully requested that this petition for certiorari be granted.

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